

## **6 Official Opinions of the Compliance Board 114 (2009)**

### ***Closed Session Procedures – Failure to follow procedural requirements – violation***

May 19, 2009

*John C. Eckert*

The Open Meetings Compliance Board has considered your complaint that the Village Council of Section 3 of the Village of Chevy Chase violated the Open Meetings Act by failing to follow the procedural requirements in closing a meeting to the public on January 14, 2009. For the reasons explained below, we conclude that the Act was violated in that no written statement documenting the justification for closure and no vote was conducted in advance of the closed session.

#### **I**

#### **Complaint and Response**

According to the complaint, on January 14, 2009, the Village Council of Section 3 of the Village of Chevy Chase closed its meeting to consider the performance and salary of the Village Manager. The complaint stated that the Village Council failed to conduct the required vote to close the meeting and that the presiding officer failed to complete a written statement documenting the basis for closure as required under the Open Meetings Act. The complaint also claimed that the Act requires that all votes must occur during a public session and be recorded in order to ensure accountability to the voters and that the Village Council failed to do so on January 14. In a follow-up letter, the complainant clarified that the Village Council had notified the public that it intended to conduct the closed session. However, the complainant argued that such notice could not serve as a substitute for the required vote.

In a timely response on behalf of the Village Council, David R. Podolsky, Esquire, noted that Section 3 of the Village of Chevy Chase is a small municipality and that Council meetings, especially those with low public attendance, are conducted informally. The response stated that the public was informed that the Village Council intended to hold the closed meeting on January 14 through the January issue of *News & Views*, a village newsletter that is circulated to every residence in the Village at least a week before each

meeting. The response noted that §10-508(a)(1)(i)<sup>1</sup> provides authority for the Village Council to close its meeting to discuss the performance and compensation of the Village Manager - the sole employee of the Village.

According to the response, four members of the Village Council, the Village Manager, and the complainant were the only ones present at the time the Council completed the public portion of the meeting January 14. Because the purpose of the closed meeting had been publicly announced and there was unanimous agreement to go into a closed session, and because there was only a single member of the public present, the presiding officer did not conduct a formal roll-call vote. Nor was a written statement completed because “the purpose of the [closed session] was clear to all who were present.” The response stated that, “[a]lthough the Council may not have strictly complied with the technical requirements of Section 10-508(d)(2), there was no intent to deceive the public.” The response further noted that no one was prejudiced by the error. The February issue of *News & Views* reported that the Council went into closed session on January 14, “where they discussed the performance and salary of the Village Manager.”

In closing, the response noted that, “[t]he Council believes it always has been following the spirit of the law. Now that the Council is aware of the technical requirements, it will comply with the letter of the law as well....”

## **II**

### **Analysis**

Given the Village Council’s acknowledgments, detailed discussion is unnecessary. The Open Meetings Act sets forth specific requirements when a public body closes a meeting under the Act. If it is anticipated that all or a part of the meeting is to be closed under the Act, the public body must so advise the public as part of the meeting notice. §10-506(b)(3). Following a closed session, publicly-available minutes must disclose certain information concerning the closed session. §10-509(c)(2). And germane to the complaint, in closing a meeting, the presiding officer must first complete a written statement reflecting the reason for closure, the statutory authority under which

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<sup>1</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

the session is closed, and the topics to be discussed. §10-508(d)(2)(ii).<sup>2</sup> This statement is a matter of public record that must be available if requested and it must be retained by the public body for at least one year. §10-508(d)(4) and (5).

Furthermore, immediately before closure, a recorded vote must occur to close the meeting. §10-508(d)(1) and (2)(i); *see also 5 OMCB Opinions* 160, 162-163 (2007) (violation occurs if vote conducted at prior meeting). Implicit in this requirement is that there be a motion by a member of the public body to close the meeting. *5 OMCB Opinions* 165, 168 (2007). However, a formal roll call vote is not necessarily required. As we have previously indicated, the Open Meetings Act does not bar a voice vote to determine consensus for closing a meeting as long as the minutes properly reflect the members present and any dissenting vote. *6 OMCB Opinions* 23, 29 (2008).

These requirements apply regardless of whether the meeting has attracted a full house or if the members of the public body are the only ones present. The failure to complete the required statement and to vote to close the meeting on January 14, 2009, violated the Act.<sup>3</sup>

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<sup>2</sup> We encourage public bodies to use the form suggested by the Attorney General which, if adequately completed, would satisfy the requirements of the Act. *See Office of the Maryland Attorney General, Open Meetings Act Manual* App. C (6<sup>th</sup> ed. 2006).

<sup>3</sup> In the complaint it was suggested that any vote by a public body must always occur in a public session. This is incorrect. Here it is clear that the Village Council was entitled to close the meeting under the Act as a personnel matter to consider the Village Manager's performance and salary. Unless some other law required that any vote concerning personnel occur in an open session, there is no reason that the Village Council could not conduct a vote during the closed session as long as the action was properly documented in the minutes of the closed session under §10-509(c)(1) as well as in publicly available minutes in accordance with §10-509(c)(2).

The response also noted that the complainant was in attendance at the time the meeting was closed and failed to object; had he done so, the Council's attention would have been focused on the Act. This is immaterial. While a citizen has a right to raise an objection at the meeting, *see* §10-508(d)(3), it is the public body's obligation to be cognizant of and follow the requirements of the Act.

**III**

**Conclusion**

We find that the Village Council violated the Open Meetings Act on January 14, 2009, when it moved into closed session without the presiding officer completing the writing statement required under the Act or conducting a vote in support of closure. Given the assurances offered in the response, we trust that the procedural requirements of the Act will be followed in future meetings of the Council.

OPEN MEETINGS COMPLIANCE BOARD

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